

Message Text

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ACTION EA-09

INFO OCT-01 ISO-00 L-03 AGR-05 CIAE-00 COME-00 EB-07

INR-07 LAB-04 NSAE-00 SP-02 STR-04 TRSE-00 CIEP-01

FRB-03 OMB-01 /047 W

----- 034156

P R 190900Z FEB 76

FM USLO PEKING

TO SECSTATE WASHDC PRIORITY 5169

INFO AMCONSUL HONG KONG

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E.O.11652: N/A

TAGS: ETRD, CH, US

SUBJECT: PRC FOREIGN TRADE ARBITRATION COMMISSION

REF: STATE 38065

SUMMARY. THE PLAINS COTTON ASSOCIATION SHOULD EXPECT TO HAVE DIFFICULTY IN SECURING A FORMAL ARBITRATION HEARING FROM THE FOREIGN TRADE ARBITRATION COMMISSION (FTAC). PRC OFFICIALS VIEW ARBITRATION AS AN UNATTRACTIVE LAST RESORT TO BE ADOPTED ONLY AFTER EXHAUSTING A VARIETY OF PROCEDURES FOR ENCOURAGING "FRIENDLY NEGOTIATIONS." THE FTAC MECHANISM COULD BE INVOKED TO PROMOTE SERIOUS NEGOTIATION BY CHINATEX, HOWEVER. END SUMMARY.

1. USLO OFFICERS MET WITH PLAINS COTTON ASSOCIATION SALES MANAGER PATTON ON FEBRUARY 17. HE EXPRESSED DISSATISFACTION WITH THE FAILURE OF CHINA NATIONAL TEXTILE CORPORATION REPRESENTATIVES TO NEGOTIATE SERIOUSLY IN TALKS PREVIOUS TO THAT DATE. PATTON HAS SINCE LEFT PEKING FOR SHANGHAI, USLO IS NOT INFORMED OF THE FINAL RESULT OF HIS DISCUSSIONS. IF HE RETURNS WE WILL PASS THE INFORMATION IN THIS LIMITED OFFICIAL USE

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MESSAGE TO HIM.

2. THE FTAC WAS ESTABLISHED AS PART OF THE CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE (CCPIT) IN 1954 AND BEGAN OPERATING UNDER THE "PROVISIONAL RULES OF PROCEDURE OF THE FTAC AT THE CCPIT," ADOPTED ON MARCH 31, 1956. A COPY OF THESE RULES CAN BE FOUND IN NCUST SPECIAL REPORT NO. 4. OF FEB. 1974. SEVERAL POINTS ARE WORTH NOTING HERE:

(A) APPLICATION FOR ARBITRATION BY THE COMMITTEE SHALL SPECIFY NAME AND ADDRESS OF PLAINTIFF AND DEFENDENT, AMOUNT OF CLAIM, AND THE FACTS AND DOCUMENTARY EVIDENCE ON WHICH THE CLAIM IS BASED. THE NAME OF AN ARBITRATOR CHOSEN FROM MEMBERS OF THE ARBITRATION COMMISSION OR A STATEMENT AUTHORIZING THE CHAIRMAN OF THE ARBITRATION COMMISSION TO APPOINT THE ARBITRATOR ON BEHALF OF THE PLAINTIFF SHALL ALSO BE GIVEN.

(B) APPLICATION FOR ARBITRATION SHALL INCLUDE PAYMENT OF ONE-HALF OF ONE PERCENT OF THE AMOUNT OF CLAIM AS A DEPOSIT FOR THE FEE REQUIRED TO COVER THE COST OF ARBITRATION.

(C) HEARINGS BY THE FTAC WILL BE HELD IN THE PRC. FOREIGN PLAINTIFFS AND/OR THEIR ATTORNEYS MAY ATTEND.

(D) COSTS, NOT TO EXCEED ONE PERCENT OF THE CLAIM, MAY BE APPORTIONED AMONG THE TWO PARTIES BY THE FTAC. ADDITIONALLY, THE FTAC MAY AWARD UP TO FIVE PERCENT OF THE CLAIM AS COSTS FOR WHICH THE WINNING PARTY MUST BE COMPENSATED BY THE LOSING PARTY.

(E) IF A COMPROMISE IS REACHED AFTER A CASE HAS GONE TO THE ARBITRATION PANEL, THE HEARING WILL BE CANCELLED.

(F) THE AWARD GIVEN BY THE FTAC IS FINAL.

3. THE FOLLOWING PROCEDURAL INFORMATION IS BASED
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PRINCIPALLY ON THE TALKS WITH THE FTAC HELD BY AMERICAN ARBITRATION ASSOCIATION (AAA) REPS HOWARD M. HOLTZMANN AND DONALD B. STRAUS DURING THEIR JANUARY 1975 VISIT PEKING. HOLTZMANN PLANNING AT THAT TIME TO WRITE A DETAILED REPORT OF THE SUBSTANTIVE LEGAL POINTS DISCUSSED, AND PLAINS COTTON ASSOCIATION MAY WISH TO CONSULT WITH THE AAA.

(A) THE FTAC HAS 21 MEMBERS DRAWN FROM VARIOUS PROFESSIONS AND ORGANIZATIONS. A CURRENT LIST OF THESE MEMBERS, AND A BRIEF DISCUSSION OF ARBITRATION IN CHINA, IS PROVIDED IN THE CHINESE PUBLICATION "CHINA'S FOREIGN TRADE," NO. 3, 1975, PAGES 50-51. THREE MEMBERS FROM THESE 21 ARE SELECTED TO FORM THE TRIBUNALS HEARING INDIVIDUAL CASES. THE TRIBUNAL MAY ASK THE TOTAL MEMBERSHIP FOR ADVICE IN CASE OF DIFFICULTY.

(B) THE INITIAL STEP IN PROCESSING A CLAIM IS AN INVESTIGATION OF THE FACTS OF THE CASE BY THE FTAC STAFF, I.E., THE CCPIT LEGAL DEPARTMENT. THE INVESTIGATION IS CONDUCTED INITIALLY BY CORRESPONDENCE. THE FTAC USES THIS PERIOD TO ENCOURAGE A NEGOTIATED SETTLEMENT BETWEEN THE TWO PARTIES, OFTEN "SUGGESTING" SETTLEMENTS OR COMMENTING ON THE MERITS OF THE VARIOUS ARGUMENTS. IF NO AGREEMENT CAN BE REACHED, A TRIBUNAL OF THREE MEMBERS IS FORMED.

(C) THE TRIBUNAL WILL THEN TRY TO PROMOTE FRIENDLY NEGOTIATIONS. IF THIS PROVES IMPOSSIBLE, A HEARING WILL BE CALLED.

(D) AN FTAC REP HAS STATED THAT IF ONE OF THE DISPUTING PARTIES VERY CLEARLY STATES THERE IS NO HOPE FOR, OR USE OF, FRIENDLY NEGOTIATIONS, THE FTAC WILL ABANDON ITS EFFORTS TO PROMOTE A SETTLEMENT AND PROCEED DIRECTLY TO ARBITRATION.

(E) FTAC "ADVICE," I.E., INVESTIGATION AND ANALYSIS, CAN BE REQUESTED WITHOUT FORMALLY SEEKING ARBITRATION.

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(F) MRM JEN TSIEN-HSIEN, CHIEF OF THE LEGAL DEPARTMENT OF THE CCPIT, TOLD AAA REPS THAT FRIENDLY NEGOTIATIONS, BEING VERY INFORMAL, COULD BE CONDUCTED IN A VARIETY OF WAYS. HE MENTIONED USING THE AAA, THE NCUST, OR PRCLO. HE NOTED THAT PRCLO HAD BEEN USED IN THE PAST FOR SUCH NEGOTIATIONS.

4. IN PRACTICE, CLAIMS VERY RARELY REACH ARBITRATION. FTAC OFFICIALS HAVE SAID THAT IN 1974 AN ARBITRATION AWARD WAS MADE IN ONE CASE AND SETTLEMENT BY FRIENDLY NEGOTIATION WAS ACHIEVED IN 12 OTHERS THROUGH FTAC INTERVENTION. THE AVERAGE TIME FOR FRIENDLY NEGOTIATION WAS SIX MONTHS, FOR ARBITRATION ONE YEAR.

5. OUR PEKING EMBASSY CONTACTS HAVE NO RECORD OF A

CASE REACHING ARBITRATION. IN A RECENT AND PROBABLY TYPICAL EXAMPLE OF AN ATTEMPT TO INVOKE AN ARBITRATION CLAUSE, A CANADIAN SWEATER MANUFACTURER REQUESTED ARBITRATION FROM THE FTAC. THIS REQUEST WAS MADE BY MEANS OF A LETTER FROM THE CANADIAN EMBASSY IN PEKING. IN DECEMBER, FTAC REPLD THEY WERE NOT ACCEPTING THE CASE FOR ARBITRATION, SINCE NEGOTIATIONS WERE STILL UNDERWAY.

6. DESPITE THE BLANK RECORD ON ARBITRATION, A SETTLEMENT OF SOME SORT HAS BEEN NEGOTIATED IN ALL CLAIMS CASES WITH WHICH USLO IS FAMILIAR. IN SOME CASES BUSINESSMEN HAVE PERCEIVED A BENEFICIAL EFFECT ON THEIR NEGOTIATIONS FROM AN ANNOUNCEMENT OF THEIR INTENTION TO SEEK ARBITRATION. A RECENT SETTLEMENT INVOLVING A U.S. SHRIMP IMPORTER IS ONE EXAMPLE.

7. THE CHINESE ARE FORTHRIGHT IN DECLARING ARBITRATION, IN ANY FORUM, TO BE AN UNATTRACTIVE LAST RESORT. WHATEVER APPROACH THE COTTON ASSOCIATION DECIDES TO ADOPT, THEY WILL ALMOST CERTAINLY HAVE DIFFICULTY IN SECURING A FORMAL ARBITRATION HEARING. ONE STEP WHICH MIGHT BE CONSIDERED BY THE COTTON ASSOCIATION IS A REQUEST TO THE FTAC FOR "ASSISTANCE AND ADVICE" IN SETTLING THEIR CLAIM. THE REQUEST COULD BE MADE THROUGH USLO PRCLO, OR DIRECTLY TO JEN TSIEN-HSIEN. ALTERNATIVELY, BY RAISING THE POSSIBILITY OF SUCH A REQUEST WITH LIMITED OFFICIAL USE

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CHINATEX THE ASSOCIATION MIGHT WIN A MORE ATTENTIVE HEARING.
THAYER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: ARBITRATION, DISPUTE SETTLEMENT, CLAIMS, GOVERNMENT REACTIONS, NEGOTIATIONS
Control Number: n/a
Copy: SINGLE
Draft Date: 19 FEB 1976
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: morefirh
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1976PEKING00281
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D760063-0237
From: PEKING
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1976/newtext/t19760234/aaaabdwe.tel
Line Count: 204
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EA
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 4
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 76 STATE 38065
Review Action: RELEASED, APPROVED
Review Authority: morefirh
Review Comment: n/a
Review Content Flags:
Review Date: 21 MAY 2004
Review Event:
Review Exemptions: n/a
Review History: RELEASED <21 MAY 2004 by ShawDG>; APPROVED <02 JUL 2004 by morefirh>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
04 MAY 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: PRC FOREIGN TRADE ARBITRATION COMMISSION
TAGS: ETRD, CH, US, PLAINS COTTON ASSOCIATION, FTAC
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 04 MAY 2006